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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-492

EDMUND A. ROSNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

On November 17, 1975, the Solicitor General requested an extension to December 17, 1975 to file the Government's response. The Court extended the time "but only to and including December 3, 1975." Subsequently another extension—to December 17, 1975—was sought and obtained. Petitioner's counsel received mail service of the Government's brief on Saturday, December 27, 1975. Prior to that date, petitioner's counsel had learned from the Clerk's office that this case was set for conference on January 9th and that the petition—and now presumably the Government's brief in opposition—would be distributed before the beginning of the week of December 29, 1975. Time constraints, caused by the Government's late filing, require petitioner to limit his reply to correcting only the most egregious errors in the Government's brief.

The Government's Conduct Before This Court

Petitioner's major point before this Court is that the United States Attorney's Office withheld critical information from this Court and misrepresented the state of the record to this Court on the prior petition for certiorari. The critical withheld information was that two Assistant United States Attorneys responsible for § 3500 material at the *Rosner* trial had knowledge prior to the trial of the existence of the Goe memorandum (disclosing a specific crime that Leuci did not admit at the *Rosner* trial) and of the Leuci-Lawrence tape (disclosing Leuci's familiarity with narcotics crimes of the type that Leuci had denied at the *Rosner* trial). The misrepresentation was that the United States Attorney affirmatively represented to this Court that the *Rosner* prosecutors had no knowledge—prior to or during the *Rosner* trial—indicating that Leuci's testimony was false. This representation was clearly misleading since the United States Attorney's Office knew when it made that statement that two Assistant United States Attorneys in that Office—who, the District Court found, "were given primary responsibility for gathering and disclosing to the defense all § 3500 material"—did have knowledge *before and during the Rosner trial* that Leuci had committed additional crimes.

The Solicitor General now argues that the fact that two Assistant United States Attorneys had information about additional Leuci crimes *pre-trial* is "of little additional significance" (Government's Brief in Opposition at 24). But under the governing case law, the question of when the Government possessed information indicating that its witness' testimony was false is extremely significant. The Government itself was aware of the importance of when such knowledge was obtained; it went out of its way to represent to this Court that the prosecutors had no *pre-trial* knowledge indicating that Leuci's testi-

mony was false.[1] The Government simply cannot have it both ways. Moreover, the record establishes that John Gordon—the Assistant United States Attorney in charge of the Appeals Section—specifically informed the United States Attorney for the Southern District of New York that "the Government's knowledge" at the time of the trial was "a critical factor" in determining whether a new trial would have to be granted. (H. Tr. at 732).

Finally, the Solicitor Genereal argues that "if there was fault in the prosecutor's failing to apprise this office of those two items, it was one of judgment, not of motive." (B. O. at 24-25). There was no such finding of fact made in either opinion below. Moreover, the Solicitor General's overly generous characterization of the prosecutor's actions before this Court entirely neglects the affirmative misrepresentation involved in informing this Court as well as the District Court that the prosecutors had no pre-trial knowledge "in connection with false testimony by Leuci." It is one thing to characterize an *omission* as inadvertent, but it is quite another thing to characterize an affirmative misrepresentation as something less than deliberate.

Moreover, the Government neglects to mention that the original decision made by the United States Attorney's

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[1] The Government's opposition to Rosner's prior petition for certiorari specifically stated: "It [the determination whether a new trial should be granted by the trial judge] should be made only after hearing such new evidence as is available, including evidence bearing on petitioner's allegations, *which the United States Attorney denies*, and *which is potentially critical to the disposition of the new trial motion*, that there was knowledge on the part of or wrongdoing by the prosecutors in connection with false testimony by Leuci." (at 10) (Emphasis added). Moreover, the record establishes that Assistant United States Attorney Sagor made a handwritten insertion in the Telex draft of the Government's brief emphasizing that misleading representation. (See Pet. at 22).

Office was to keep from the Court on the prior certiorari petition *even the fact that Leuci had committed perjury at the Rosner trial.* (H. Tr. at 763, 767, 769). Only public disclosure by the press led the United States Attorney's Office to change its position. And even then it failed to disclose to this Court all it knew. The record in this case plainly establishes that the United States Attorney's Office made a series of premeditated and strategic decisions to withhold relevant information from the courts and they affirmatively misrepresented the state of their pre-trial knowledge to this Court.

Petitioner has now raised this serious charge before three courts. Both the District Court and the Court of Appeals declined to pass on it, holding that even if true, they would not grant the relief sought. The Solicitor General argues that the charge is not true. In light of the lower courts' refusals to pass on the merits of this charge, this Court cannot accept the Solicitor General's self-serving contentions without a full review on the merits. Unless this Court grants review in this case, a serious and unresolved cloud will continue to hang over the performance of an important United States Attorneys Office before this Court. One would have expected the Government to urge review by this Court if for no other reason than to clear the air of this serious charge. Their failure to do so necessarily raises the suspicion that the Government fears that a full hearing on this issue will not support its contention.

The Solicitor General—in a fallback position—argues that even if the charge is true, a new trial should not be granted in the absence of prejudice to the defendant. (B. O. at 26, N. 10). "For it is less the prosecutor than the criminal justice system and the public that would suffer the penalty.". This argument—made in all cases involving prophylactic reversals—raises a significant issue of policy that should be considered by this Court on the merits.

The Government's Conduct Before The Lower Courts

The Government makes two arguments in rebuttal to the petitioner's claim that the Court of Appeals erroneously failed to apply the standard established by this Court—that "a new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury'" *Giglio* v. *United States*, 405 U.S. 150, 154 (1971), quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959). The Government asserts first that petitioner's "contention rests on an inaccurate characterization of the standard applied by the court of appeals" (B. O. at 17), and second that it is merely "an attack on the findings of the district court and court of appeals" not on the application of a legal standard (B. O. at 19). Both arguments seriously distort petitioner's position before this Court.

The Government rests its argument that petitioner inaccurately characterized the standard employed below on petitioner's quotation of the lower court's statement that "the standard demands more than the possibility of a different result upon retrial," and its requirement that a juror "*would be led* to reasonable doubt about Rosner's guilt." (B. O. at 17, emphasis in Petition). The Government does not assert that the Court of Appeals *not* make these statements, merely that it did not mean them in the way that petitioner would have this Court read them. In support of this assertion, the Government quotes one particular sentence as embodying "[t]he test actually used by the Court of Appeals":

> whether there is a *significant chance* that skilled counsel could have developed the [additional] evidence of Leuci's criminality . . . to impeach his credibility to the extent that a juror would be led to a reasonable doubt about Rosner's guilt." (B. O. at 17, emphasis by Government.)

Having underscored the words "significant chance", the Government argues that by use of that phrase, the lower court means that a new trial would be required "when the particular facts of the case suggest[ed] some reasonable possibility (beyond the purely theoretical possibility) of a different result," and that therefore the lower court actually applied the very same "could" standard as is articulated in *Giglio*.

But the Government's interpretation of the phrase "significant chance", wrenched from its context, is deceptive; it detracts attention from other phrases and sentences used by the Court of Appeals which leave no doubt that that Court did *not* perceive itself as applying a "could" standard. In the very same sentence in which the Government finds the phrase "significant chance", the court wrote:

> An Appellate Court must weigh whether or not there is in reality a "significant chance" that the disclosure *would have* induced a reasonable doubt in the minds of enough jurors to prevent a conviction. (Pet. App. at 38a, emphasis added).

While the Court of Appeals paid lip service to phrases reminiscent of the *Giglio* test,[2] when it came to its bottom-line decision denying that petitioner was entitled to a new trial, it specifically relied on the "would" formulation of the test:

> In view of the evidence therein presented, it strikes us as highly unlikely that the shift in the trial equation produced by two additional pieces of impeachment information . . . *would have been* sufficient to change the result. We conclude that these

[2] Thus, for example, the lower court at one point used the phrase, "might have induced a juror who had no reasonable doubt of Rosner's guilt to have such doubt." (Pet. App. 39a), which the Government seizes on out of context to attempt to prove its point.

> items, no matter how skillfully used by defense counsel, *would not have so altered* a juror's perception of Leuci's credibility as to induce a reasonable doubt of Rosner's guilt on the basis that he had been entrapped. (Pet. at 50a).

In light of these plain and unambiguous statements by the court—and despite the Government's present claim to the contrary—it is clear that the petitioner in this case was held to a much higher burden of proof than that contemplated by the *Giglio test*:—*an assertion that an event WOULD occur plainly requires greater certainty than an assertion that it COULD occur.*

Moreover, in its petition for certiorari in another case, *United States* v. *Agurs*, 75-491, the Government virtually conceded that the Second Circuit applied a more stringent standard in this case than that suggested by the "could" test. In *Agurs*, the District of Columbia Circuit had formulated the relevant test as requiring that "the undisclosed evidence . . . *might* have led the jury to entertain a reasonable doubt about appellant's guilt." (*Agurs* Pet. App. at 11a, emphasis added). To support his application for certiorari, the Solicitor General specifically argued that there was a conflict between the "relaxed" standard applied by that court and the standard applied by the Court of Appeals in this case.

Having had certiorari granted in *Agurs*, the Solicitor General now conveniently argues that there really is no conflict between the two cases, and that the conviction in this case would have to be affirmed even under the *Agurs* standard. Surely, the Government should not be allowed to have it both ways.[3] But in any event, petitioner

[3] In *Agurs* the Solicitor General argues that the sine qua non of a *Brady* violation is a meaningful defense production request for the suppressed material. In this case there can be no dispute that such a request was repeatedly conveyed to the prosecution. (See Pet. at 7-8).

vigorously disputes the Government's conclusory allegation that the result in this case would have been unaltered under the *Agurs* test. Notwithstanding the Government's undocumented assertion that "petitioner was not prejudiced under any formulation of the test", on the face of the record of this case (briefly summarized at pp. 41-42 of Pet.), it is patently unreasonable to maintain that the total destruction of Leuci's credibility *could not* in "any reasonable likelihood have affected the judgment" of even one single juror. Nor is this assertion merely an "attack upon the findings of the district court and the court of appeals" as the Government claims; rather it is an assertion that in both lower courts the petitioner was refused a new trial by application of a standard directly in conflict with those applied by this Court and by several other circuits. On December 18, 1975, the Third Circuit decided *United States* v. *McCrane* (75-1643) in a manner so as to create a direct conflict between that decision and the instant case. In *McCrane*, the Court held that a new trial must be granted if "the absence of [the withheld] impeachment matter . . . tends to impair seriously the reliability of the only witness whose testimony carries the case to the jury." (Slip Op. at p. 9). The Court in that case explicitly applied a "might" rather than a "would" standard, ("we cannot exclude the other inference . . . that at least some of the jurors might have felt . . ."). The Court explicitly rejected the "would" test and adopted instead the "could" standard: "It is difficult to predict the reaction of the jury if at that point the letters written by the United States Attorney's Office had been brought to their attention. The letters perhaps might have had no effect; but undeniably they could have shown that the witness . . . was in fact cooperative and financial self-interest was

involved." (Id. at 10). Thus, yet another Circuit is in conflict with the standard relied on by the court below.[4]

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[4] Several misstatements in the Government's brief require correction:

1) The Government argues that petitioner's failure to call Lawrence as a witness at the new trial hearing "tends to undermine the defense contention that Lawrence's information was of such singular value that the Government prosecutors should have investigated it more thoroughly" (B. O. at 22, N. 7). The Government fails to comprehend the critical distinction between the Lawrence information *before* Leuci's recantation and *after* it. Before it, Lawrence was the sole source of information that Leuci was a fulltime major criminal and had perjured himself at Rosner's trial. After Leuci's recantation, Leuci became the best evidence of that now undisputed fact. It would have been redundant in the extreme for petitioner to call Lawrence to corroborate Leuci's admissions that he did indeed engage in numerous illegal drug transactions.

2) The Government alleges that its investigation of the leads provided by Lawrence was adequate (B. O. at 21). Neither court below found that to be the case. Indeed the record clearly establishes that the investigation and the polygraph test were total shams. (See Pet. at 15-17).

3) Finally, petitioner contends that new information has recently come to attention regarding additional crimes about which the Government knew pre-trial. The Government argues that a) the petitioner knew of these crimes prior to the hearing; and b) that they were not really crimes since the illegal wiretaps were installed "with the knowledge of the government". Petitioner denies that he had actual knowledge of these crimes prior to the hearing. Moreover, the record reveals that the prosecutors who knew of these additional Leuci crimes before the *Rosner* trial certainly regarded them as real crimes; indeed they contemplated prosecuting Leuci for them. (Pet. at 30, 31, N. **). Surely, it cannot seriously be argued today that a prosecutor's approval of an illegal wiretap—if there was such approval here—converts an illegal act to a lawful one. See *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D. D. C. 1974).

CONCLUSION

The petition for a writ of certiorari should be granted.

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